IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

WILLIAM L. BOYD, IV

Appellant,

v. TCA 90-40132-WS

T. WHITNEY STRICKLAND, BKRTCY NO. 89-07043

Appellee.

William L. Boyd, IV, the debtor and appellant herein, seeks review of two orders entered by the United States Bankruptcy Court for the Northern District of Florida. In the first order, entered on the docket on September 11, 1989, the bankruptcy court sustained the trustee's objections to the debtor's claimed exemptions. See document 36. In its second order, entered on July 17, 1990, the court affirmed all but two portions of its previous order. See document 52. For the reasons discussed below, this court affirms, in part, the bankruptcy court's orders.

I. BACKGROUND

On February 15, 1989, William L. Boyd, IV, filed his petition under Chapter 7 of the Bankruptcy Code seeking relief from his obligation to repay certain debts owed by him as an individual. Boyd's wife did not join in the petition.

Of his scheduled assets having a value somewhat under $800,000, Boyd claimed exemptions for assets having an approximate value of $765,000. Boyd's claimed exemptions included: (1) his personal residence in Tallahassee, including its contents, owned by Boyd and his wife as tenants by the entirety; (2) a Tallahassee condominium, one half of which is owned by Boyd and his wife as tenants by the entirety; (3) a lake house and its contents, located in Lake Seminole, Georgia, owned by the debtor and his wife as joint tenants with the right of survivorship; (4) the cash surrender value of various life insurance policies; and (5) Boyd's retirement account valued at $281,625.90. See document 1, Schedule B-4.

The trustee raised objections to all of the above claimed exemptions. The bankruptcy judge sustained these objections, elaborating only as to the exempt status of properties held jointly by the debtor and his non-filing spouse.

Recognizing that jointly-held property is exempted from administration by the trustee to the extent such property is exempt from process under state law, the bankruptcy judge

suggested that the trustee in this instance would be entitled to liquidate the debtor's interest in the Florida properties, subject to the limitations of section 363(h) of the Bankruptcy Code, because it appeared that there were joint creditors of both spouses who under Florida law could levy on the properties. He also said that if the trustee were permitted to liquidate the Florida properties under section 363(h), then whatever proceeds were recovered would be treated like any other asset of the estate, to be distributed pro rata to all creditors under the bankruptcy distribution scheme.

As to the real and personal property located in Georgia, the bankruptcy judge noted that under Georgia law each joint tenant has the unilateral power to sever a joint tenancy by recording an instrument transferring all or a part of his interest in the subject property. The judge concluded that the trustee -- standing in the debtor's shoes -- could likewise alienate the debtor's interest in joint property. If the property could be alienated, it followed that joint property would not be immune from process under Georgia law and would not be excludable from the bankruptcy estate.

Upon the debtor's motion for rehearing, the bankruptcy judge held a hearing on June 13, 1990. At such time, the trustee withdrew his objections to the debtor's homestead property and retirement account and abandoned his claim to the debtor's

Tallahassee condominium. See document 61. Debtor's counsel advised the court that Boyd had reaffirmed all his joint debts and that no joint creditors had filed claims to the proceeds of the bankruptcy estate. He nevertheless argued that if the Florida tenancy by the entirety properties were brought into the estate and administered to the extent of joint claims, any proceeds from the sale of such properties would be available only to joint creditors. He also argued that the cash surrender value of an insurance policy upon the life of Boyd's wife would be exempt under section 222.14 of the Florida Statutes. See document 61.

Rejecting the arguments presented by debtor's counsel, the bankruptcy court denied debtor's motion for rehearing with respect to the exempt status of the jointly held properties and the cash surrender value of the insurance policy on Mrs. Boyd's life. He declared null and void those portions of his September 11, 1989, order which addressed the debtor's real property homestead and retirement account exemptions. See document 52.

On July 24, 1990, Mr. Boyd filed a timely notice of appeal of the bankruptcy court's orders, challenging virtually all aspects of the judge's decision. Since that time, the parties have fully briefed the issues and have advised this court, after the bar date, that there are no creditors holding allowable, unsecured, joint claims against both the debtor and his non-

filing spouse that would permit the trustee to administer any of the debtor's Florida tenancy by the entirety property. The briefing now complete, the case is ripe for review.

II. STANDARD OF REVIEW

The standard of review is established by Rule 8013 of the Bankruptcy Rules, which states:

> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree of remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witness.

The "clearly erroneous" standard set out in Rule 8013 applies only to findings of fact and does not limit review of the bankruptcy court's conclusions of law. The standard has been explained as follows:

> [The district] court as an appellate court gives deference to all findings of fact by the fact finder if based upon substantial evidence, but freely examines the applicable principles of law to see if they were properly applied and freely examines the evidence in support of any particular finding to see if it meets the test of substantiality.

State Farm Mut. Auto. Ins. Co. v. Fielder (In re Fielder), 799 F.2d 656, 657 (11th Cir. 1986).

There being no dispute as to the facts in the case at bar, this court freely examines the bankruptcy court's conclusions of law.

III. DISCUSSION

A. Joint Properties

Upon the filing of an action under the Bankruptcy Code, an estate is created which is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). As the debtor properly concedes, jointly-held property, including tenancy by the entirety property, is within the scope of section 541(a).

Notwithstanding its inclusion in an estate under section 541(a), jointly-held property may be exempted from administration by a bankruptcy trustee under section 522(b)(2)(B), which section provides that:

> any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

Importantly, this section does not create a blanket exemption for a debtor's interest in property held as a joint tenant or as a tenant by the entirety. It creates an exemption only to the extent any such interest is exempt from process under applicable local law.

1. Georgia Property

The debtor in this case has claimed an exemption for real and personal property located in the state of Georgia and owned

by him and his wife as "joint tenants with right of survivorship and not as tenants in common." He argues that he is entitled to exempt this property under section 522(b)(2)(B) because his interest is exempt from process under Georgia law. In contrast, the trustee contends that the debtor is not entitled to a section 522(b)(2)(B) exemption because the debtor's Georgia property is subject to process under local law.

Georgia Code Section 44-6-190 defines joint tenancies as follows:

> Any instrument of title in favor of two or more persons shall be construed to create interests in common without survivorship between or among the owners unless the instrument expressly refers to the takers as "joint tenants," "joint tenants and not as tenants in common," or "joint tenants with survivorship" or as taking "jointly with survivorship." Any instrument using one of the forms of expression referred to in the preceding sentence or language essentially the same as one of these forms of expression shall create a joint tenancy estate or interest that may be severed as to the interest of any owner by the recording of an instrument which results in his lifetime transfer of all or a part of his interest.

Clearly, the statute makes no provision for a tenancy by the entirety and, in fact, gives each joint tenant a power no entireties tenant would have: the unilateral power to alienate his interest in the property and thus to terminate the joint tenancy. Such power carries with it the potential for execution and levy by creditors, including the individual creditors of any one of the joint tenants. See generally Note, Debtor-Creditor

Rights, 12 Ga. L. Rev. 814, 947-949 (1978) (an undivided interest in real or personal property is subject to levy under Georgia law if the property can be voluntarily transferred).

The debtor in this instance has cited no case, and the court's independent research has revealed no case, which indicates that Georgia law makes joint property exempt from process by the creditors of an individual tenant. Indeed, the court's review of Georgia law indicates that the opposite is true. It thus follows that the bankruptcy judge was correct in ruling that: (1) Mr. Boyd is not entitled to an exemption under section 522(b)(2)(B) for his real and personal Georgia property; (2) Mr. Boyd's Georgia property is subject to administration by the trustee; and (3) if the trustee meets the four conditions of section 363(h) and a sale is made, the debtor's portion of the proceeds can be used to satisfy the claims of his individual creditors according to the distribution scheme in section 726 of the Bankruptcy Code.

Accordingly, this court AFFIRMS the bankruptcy judge's orders as they relate to the debtor's real and personal property located in Georgia.

2. Florida Property

The debtor's property in Florida, both real and personal, is owned by him and his wife as tenants by the entirety. Under Florida law, such property is beyond the reach of creditors of

only one spouse but is not protected from the creditors of both spouses. Stanley v. Powers, 123 Fla. 359, 166 So. 843 (1936). While conceding that there are joint creditors having liens against the entireties property, the debtor here argues that the property is nonetheless exempt under section 522(b)(2)(B) because none of the joint creditors has filed an allowable unsecured claim in the bankruptcy case. The trustee agrees that no creditor has filed a claim in this case that would allow the trustee to administer the Florida tenancy by the entirety property.

Without reference to the absence of claims filed by joint creditors, the bankruptcy judge ruled that the existence of joint creditors was sufficient to bring the tenancy by the entirety property into the bankruptcy estate. Once in the estate and subject to administration by the trustee, any proceeds from the property, he said, would be subject to the usual bankruptcy distribution scheme. Importantly, because the facts in this case present no issue as to the tenancy by the entirety property, the judge's decision was advisory. Because federal courts are not permitted to issue advisory opinions, those portions of the bankruptcy judge's orders that concern the debtor's real and personal property located in Florida are hereby VACATED AND SET ASIDE.

B. Life Insurance

The debtor seeks to exempt the cash surrender value of a life insurance policy owned by the debtor-beneficiary on the life of his non-filing spouse. The bankruptcy judge ruled that no such exemption is permitted under section 222.14 of the Florida Statutes. He thus sustained the trustee's objections to the claimed exemption.

Section 222.14 provides, in relevant part, as follows:

> The cash surrender values of life insurance policies issued upon the lives of citizens or residents of the state...shall not in any case be liable to attachment, garnishment or legal process in favor of any person whose life is so insured...unless the insurance policy...was effected for the benefit of such creditor.

By its express language, the statute exempts the cash surrender value of life insurance policies from the reach of an insured's creditors. The statute contains no language which makes the exemption applicable to the creditors of a policy's owner or beneficiary.

At least one court has explicitly held that section 222.14 applies exclusively to the creditors of the insured. In In re Butcher, 75 B.R. 441 (E.D. Tenn. 1987), aff'd, 848 F.2d 189 (6th Cir. 1988), the debtor claimed an exemption for the cash surrender values of various life insurance policies insuring the life of her husband. As the owner and beneficiary of the

policies, the debtor argued that the cash surrender values were exempt under the applicable Florida law, namely under section 222.14 of the Florida Statutes. In affirming the bankruptcy court's decision to deny the debtor's claimed exemption, the district court stated: "By the plain language of the statute, the cash surrender value of the life insurance policies are [sic] exempted only from the reach of the creditors of the insureds." Id. at 446. The Butcher court noted that the statute does not exempt the cash surrender value of life insurance policies from the reach of an owner-beneficiary's creditors. Because the debtor in Butcher was not the person whose life was insured, the district court rejected the debtor's claim that the insurance policies owned by her upon the life of her husband were exempt.

As in Butcher, the debtor here -- in his capacity as owner-beneficiary and not as an insured -- seeks to exempt the cash surrender value of a life insurance policy. As in Butcher, the claimed exemption in this case cannot be sustained. Accordingly, this court AFFIRMS the bankruptcy judge's orders as they relate to the debtor's claimed exemption for the cash surrender value of a life insurance policy on the life of the debtor's wife.

IV. CONCLUSION

For the reasons explained above, the bankruptcy judge's orders of September 11, 1989, and July 17, 1990, as they relate to the debtor's Florida tenancy by the entirety property, are

VACATED AND SET ASIDE. In all other respects, the bankruptcy judge's orders are AFFIRMED.

DONE AND ORDERED this 1st day of November, 1991.

William Stafford

WILLIAM STAFFORD
CHIEF JUDGE